Supreme Court, U.S.
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No. 85-1498

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARTHA U. MOORE and CHARLES MOORE,

Petitioners,

vs.

VOLKSWAGENWERK, A.G., VOLKSWAGEN OF AMERICA AND SOUTHERN VOLKSWAGEN, INC.

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Fourth Circuit

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BRIEF OF RESPONDENT SOUTHERN VOLKSWAGEN, INC. IN OPPOSITION

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QUESTION PRESENTED

Does a trial judge who correctly decides to order a new trial as to two defendants have jurisdiction to include in the Order a third defendant who did not file a motion for new trial, but whose liability is completely derivative of and coextensive with that of the two defendants who did so file.

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Respondents.

BRIEF OF RESPONDENT SOUTHERN VOLKSWAGEN, INC. IN OPPOSITION

The Respondent, Southern Volkswagen, Inc., ("Southern") opposes the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioners have in their Statement of the Case correctly said that the substantive basis for their action in the District Court as to all three defendants was manufacturer and seller strict liability in tort. Under that theory, the liability of Southern as immediate seller was by definition dependent upon, de-

rivative of, and coextensive with the liability of VOA as intermediate seller and, in turn, of the liability of VWAG as manufacturer.

The jury verdict and judgment entered thereon in the District Court was not, however, as asserted by Petitioners in their Statement of the Case,

> "against the defendants in the amount of $250,000.00."

Instead, the judgment was:

> "in favor of plaintiffs against defendant, Volkswagenwerk, A.G., in the sum of One Hundred Thousand Dollars ($100,000.00), and in favor of plaintiffs against defendant, Volkswagen of America, in sum the sum of One Hundred Thousand Dollars ($100,000.00), and in favor of plaintiffs against defendant, Southern Volkswagen, Inc., in the sum of Fifty Thousand Dollars ($50,00.00) for a total judgment in favor of plaintiffs against defendants in the sum of Two Hundred Fifty Thousand Dollars and no cents ($250,000.00)." *See* Apx. 1.

There was not in that judgment any language of "joint and several" liability.[1]

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[1] Petitioners' assertions at page 8, fn 1 of the Petition, that the 4th Circuit's fear of inconsistent verdicts was unfounded because if the District Court had left the verdict intact "Southern would have been responsible for paying the entire $250,000.00 verdict" is, in view of the judgment actually entered, obviously incorrect.

During the argument before the 4th Circuit, both the amount of the judgment as to Southern and the absence in the judgment

The District Court set that judgment aside and ordered a new trial as to all defendants. The new trial as to all three defendants commenced on October 29, 1984. Petitioners declined to present any evidence and on motions to dismiss made in open court by VWAG, VOA and Southern, final judgments were entered in their favor.

A disclosure of corporate affiliations and financial interests of this Respondent was previously filed with the Fourth Circuit Court of Appeals.

REASON FOR DENYING WRIT

The Decision Below Was Not Bottomed Upon An Interpretation Of Rule 50(b), And Is Not Inconsistent With Any Decision Of Any Other Court Of Appeals.

The question presented as framed by Petitioners is an interesting one, but it did not form the basis for the holding of the Court of Appeals. Although the Court of Appeals, in the course of its *per curiam* opinion, cited *Jackson v. Wilson Trucking Co.*, 243 F.2d 212, it did not depart from the *Jackson* holding and did not adopt or for that matter even mention the *Jackson* dissent.[2]

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of language of joint and several liability figured prominently in questions directed by the panel to counsel. For Petitioners now to so cavalierly dismiss the inconsistent verdict issue without even printing the actual judgment seems to Respondent less than candid.

[2] Southern had raised the *Jackson* issue in Argument II of its Brief in the Court of Appeals, but the 4th Circuit did not reach it. Southern had argued there in favor of the *Jackson* dissent and, alternatively, that the *Jackson* rule was only applicable where the District Court made a specific finding of legal sufficiency of the evidence to support the verdict. It noted that in

The *holding* of the Court of Appeals was that because a new trial was clearly warranted with respect of VWAG and VOA,

> "The trial judge was not compelled to risk inconsistent verdicts by declining to grant a new trial to the remaining defendant."

This holding mirrored the concern expressed by the trial judge who, in ruling on the motions, said if he granted a new trial as to VWAG and VOA, he

> "would have to necessarily grant a new trial as to Southern Volkswagen because the contribution [and indemnification] issue would bring it back to me to pass on the status of Southern in the event of a new trial as to the others."

As previously noted, in the posture that this case went to the jury, the liability of Southern as the immediate seller was wholly dependent upon, derivative of, and coextensive with the liability of VOA as the intermediate seller and, in turn, of the liability of VWAG as manufacturer.

Once the District Court determined that the evidence applicable equally to all three defendants was insufficient to support the judgment of $100,000.00 against VWAG and the judgment of $100,00.00 against VOA, what was the Court to do with the judgment of $50,00.00 against Southern, and with Southern's pending Motion for a judgment of indem-

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the instant case, the District Court did not make such a finding, saying instead that the case was "perilously close" to JNOV, and that it "did not lack confidence" that JNOV should be granted.

nification against VOA and VWAG as its precedessors in the distributive chain—other than that which it did—include Southern in the Order granting a new trial.

The decision of the Court of Appeals, affirming that action, is not in conflict with the decision of any other Court of Appeals.

Petitioners assert that *Jackson v. Wilson, supra.*, *Peterman v. Chicago, R.I. & Pacific RR. Co.*, 493 F.2d 88 (8th Cir., 1974), *cert. den.* 94 S.Ct. 3072, *Alderman v. Tandy Corp.*, 720 F.2d 1234 (11th Cir., 1983), and *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411 (8th Cr. 1985), are in conflict with the decision here of the Fourth Circuit. However, each of those cases involved a *single* defendant or plaintiff whose post-trial motion was for JNOV only. (See in this regard fn 2, *infra*, at page 3). There was not, in any of those cases, *any* timely Motion for New Trial, and no issue of inconsistency of verdicts.

Equally inapposite to the Fourth Circuit's decision here are *Kain v. Winslow*, 736 F.2d 606 (10th Cir., 1984), *cert. den.* 105 S.Ct. 1360, and *Tarlton v. Exxon*, 688 F.2d 973 (5th Cir., 1982), *cert. den.* 103 S.Ct. 3356. In each of these cases, the post-trial motions dispute involved two defendants found liable for *separate* and *independent* acts of negligent or intentional misconduct. Neither case involved the grant of a timely new trial motion in favor of either defendant.

The holding of the Court of Appeals in this case is, in every respect, consistent with its prior holdings in *Maryland Casualty Company v. City of So. Norfolk*, 54 F.2d 1032 (4th Cir., 1936), modified on other grounds, 56 F.2d 822, *cert. den.*, 52 S.Ct. 644 (1936),

and *Werner v. Carbo*, 731 F.2d 204 (4th Cir. 1984), earlier on appeal at 628 F.2d 848, with *cert. den.* at 101 S.Ct. 862, and *Stonehocker v. General Motors Corporation*, 587 F.2d 151 (4th Cir. 1978).

It is equally consistent with the decisions of the Second Circuit in *In Re Barnett*, 124 F.2d 1005 (1942), the Fifth Circuit in *Kicklighter v. Nails By Janee, Inc.*, 616 F.2d 1980), the Eighth Circuit in *Ryan v. McDonough Power Equipment, Inc.*, 734 F.2d 385 (1984), the Ninth Circuit in *Continental Casualty Co. v. United States*, 167 F.2d 107, *cert. den.* 69 S.Ct. 1517 (1948), and the Tenth Circuit in *Daniels v. Gilbreath*, 668 F.2d 477 (1982).

Each of those decisions stands for the proposition that a successful new trial motion or appeal by one party properly extends to another party—including one who may have sought no post-trial or appellate relief—where that other party's liability is derivative of and coextensive with that of the moving party.

CONCLUSION

Southern respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SASSCER, CLAGETT, CHANNING & BUCHER

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14803 Pratt Street
Upper Marlboro, Maryland 20772

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

ARTHA U. MOORE and CHARLES J. MOORE, her husband

vs.

OLKSWAGENWERK, A.G., a corporation of the Federal Republic of Germany and VOLKSWAGEN OF AMERICA, INC. a New Jersey corporation and SOUTHERN VOLKSWAGEN, INC., a Maryland corporation

JUDGMENT

This action came on for trial before the Court and a Jury, Honorable Norman P. Ramsey, United States District Judge, presiding. The issues having been duly tried and the jury having duly rendered its verdict, it is Ordered and Adjudged that judgment is entered in favor of Plaintiffs against defendant, Volkswagenwerk, A.G., in the sum of One Hundred Thousand Dollars ($100,000.00) and in favor of Plaintiffs against defendant, Volkswagen Of America, in the sum of One Hundred Thousand Dollars ($100,000.00) and in favor of Plaintiffs against defendant, Southern Volkswagen, Inc., in the sum of Fifty Thousand Dollars ($50,000.00) for a total judgment in favor of Plaintiffs against Defendants in the sum of Two Hundred Fifty Thousand Dollars and no Cents ($250,000.00)

Dated at Baltimore, Maryland this 23rd day of May, 1984

PAUL R. SCHLITZ, Clerk
By: /s/Paul Hansen
PAUL HANSEN